***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

ORIGINAL

# 75-7037

*To be argued by Arthur N. Seiff.*

# United States Court of Appeals

**For the Second Circuit.**

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AUDREY WEINER, as Administratrix of the Estate of JULIE A. WEINER, Deceased,
*Plaintiff-Appellant-Appellee,*

*v.*

BARBARA WEINER, LOUIS B. WEINER, BARRY STONE, JANE STONE, GREYHOUND BUS LINES, INC., and RONALD BROWN,
*Defendants-Appellees-Appellants.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

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## BRIEF FOR DEFENDANT-APPELLEE, BARBARA WEINER.



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(7259)

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# United States Court of Appeals

FOR THE SECOND CIRCUIT.

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AUDREY WEINER, as Administratrix of the Estate of Julie A. Weiner, Deceased,

*Plaintiff-Appellant-Appellee,*

*against*

BARBARA WEINER, LOUIS B. WEINER, BARRY STONE, JANE STONE, GREYHOUND BUS LINES, Inc., and RONALD BROWN,

*Defendants-Appellees-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

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## BRIEF FOR DEFENDANT-APPELLEE,

### Preliminary statement.

In this motor vehicle collision negligence action, plaintiff, whose intestate was riding in a motor vehicle operated by defendant Barbara Weiner (hereinafter referred to as defendant), appeals from a judgment for defendant entered on the unanimous verdict of a jury in favor of said defendant.

Defendant's vehicle, being operated well below the speed limit, skidded while proceeding down a hill on a snowy and slushy road, went to its right and then to its left across the road, and collided with a bus proceeding in the opposite direction.

## Defendant's contentions.

1. The proof and the applicable law sustain the verdict and the trial court's denial of plaintiff's motion to set the verdict aside.

2. Plaintiff's argument that (a) defendant's summation and (b) alleged errors in the trial court's charge compel a new trial is not borne out by the record and the applicable law.

## The proof.

Plaintiff's brief statement of the evidence (appt.'s brief, pp. 1-2, 20) omits much proof, proof that sustains the verdict.

Defendant, the mother of plaintiff's intestate, was driving a motor vehicle (188) in which were her husband* who was sitting in front with her (273) and their two children, the intestate and a son Alan, both of whom were in the rear seat (212-13, 272).

Defendant, called as a witness by plaintiff, testified that she had no recollection of the accident (189; cf. 190). This was supported by the testimony of a police officer called as a witness by plaintiff (63, 64, 99, 111-13; cf. 208, 225-6). Plaintiff's attorney himself stated that defendant had no recollection of the accident and introduced exhibits to prove that (244, 248; ptff.'s exs. 4 and 5). In summation he avowed, ". . . as sure as I am standing here, this woman has no memory of this accident . . . ." (583). Plaintiff's attorney also stated that the record of the hospital in which defendant was con-

*He was the owner of that motor vehicle and plaintiff had originally also sued him (25-30) but discontinued the action against him on the trial (453-4, 456).

fined for an extended period after the accident "would show some amnesia" (199); he said that he would subpoena that record (261) but he did not.

Mr. Weiner, called as a witness by plaintiff, testified that he was sick and sleeping at the time of the accident and didn't know what happened (273-4, 274, 275-6, 277, 284-5; cf. 281-2) and plaintiff's attorney in his summation agreed thereto (575).

Plaintiff did not call as a witness the Weiner boy, Alan, who was sitting in the rear seat with his sister, plaintiff's intestate. Plaintiff's attorney explained that the two children were playing at the time and "the next thing he [Alan] remembers is waking up in the Albany Medical Center" (587).

The proof as to how the accident happened was given by a police officer, the bus driver, and a man and wife in a motor vehicle driving behind the Weiner vehicle.

There is testimony and reports by these witnesses that the Weiner car was going, well below the speed limit (54, 466-7), around a left curve (54, 388-9, 481) down a large hill (53, 95) on a two lane road which had one lane in each direction, each lane 10 feet wide (52, 53-4, 58); that there was slush and snow on the road and on the adjacent shoulder which was three or four feet wide (80, 81, 314, 365, 388, 400, 485-6). The police officer's report said that the road condition was "snow and ice" (81). The bus driver testified that "the road was wet and slushy" (365), that the slush was "heavy, wet snow" (365), that even though some of the road had been plowed "the roadway itself was wet and slushy . . . dirty wet snow" (321-2, 388). The testimony of the people in the car following the Weiner car was to the same effect (400, 467-8, 485-6).

There was proof that even though the Weiner car had snow tires (278-79, 297-98), it got "caught in the slush on the side of the road" (467-8, 367-8), that it skidded and went out of control and hit the guard rail to its right and caromed off and went across the road and into the bus which was coming in the opposite direction (94-5, 150, 154-5, 477-9, 480; cf. 104, 109-10, 329, 334); that it was where there was slush, the "heavy, wet snow", on the road that the Weiner car left the road (365-6)*. The bus driver testified variously (1) that he thought the Weiner car did not skid (337, 362), (2) that he could not definitely say it did not skid (362-3). When it was called to his attention that he had reported in a signed report that the Weiner car had skidded (353-4), he re-affirmed this:

> "Q You believe that's truly what happened?
> A The car skidded." (357)

There was other testimony, by the driver of the car following the Weiner car, that it "pulled over to the right-hand side of the road where the shoulder is and there was slush there and the right-hand tire or actually right-hand side of car went into the slush" (468), it "moved over to the right" (474). Although he added, at that time, that he didn't know why the Weiner car moved to its right (474), plaintiff's attorney himself brought out that a vehicle going around a left curve, as the Weiner vehicle was doing at that time, would be subjected to a "natural pull", by "centripetal" force, to its right (388-9) and that with the "(w)heels going left, car moves to the right" (481). This obviously would be accentuated by the wet, slippery, road at that place (cf. 365-6, 388).

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*There was testimony that there was snow piled up against the guard rail (322) which piled up snow did not come out to the highway (323).

There was conflicting conclusory testimony to the effect that the Weiner car lost control because it moved to the right onto the shoulder into the snow and against the snowbank (480-1; cf. 482, 483, 484) which was piled against the guard rail (322), that it didn't skid before it went onto the shoulder (481). The shoulder was only three or four feet wide and also had slush on it (322).

## POINT I.

### (Answering plaintiff's Point II)

**There was a question of fact for the jury to decide, based on proof in the case and the applicable law. That proof and applicable law sustain the verdict.**

**(a)**

The trial court submitted, as an issue of fact to be decided by the jury, the issue as to whether defendant was negligent under the facts of this case, detailing those facts (607-8), and plaintiff expressly consented thereto at a prior conference at which that proposed charge was discussed (529-30; cf. 513). Consequently, plaintiff can not on this appeal for the first time contest the fact that there was a question of fact which was for the jury to decide as to whether or not defendant was liable under the facts in this case (*Matter of Williams* v. *Lincoln Metal Products Co.*, 38 A.D. 2d 1003; *Rogers* v. *Dorchester Associates*, 39 A.D. 2d 1003, affd. as to this aspect of the case in 32 N.Y. 2d 553, 563; *Meyers v. Grand Union Co.*, 30 A. D. 2d 704).

Further, plaintiff conceded on the trial that this case presented a *bona fide* issue of fact for the jury to decide, both (1) by failing to move for a directed verdict at

the close of the evidence (*Holpp* v. *Carafa*, 8 A.D. 2d 617; *Gutin* v. *Frank Mascali & Sons, Inc.*, 11 N.Y. 2d 97, 98; cf. *Behan* v. *Ivanhoe Co.*, 263 App. Div. 963)* and (2) by failing to except to the court's charge submitting the issue as one of fact for the jury to decide (*Brown* v. *DuFrey*, 1 N.Y. 2d 190, 195-6; *Chapman* v. *Thirty-Ninth St. Realty Corp.*, 26 A.D. 2d 806).

**(b)**

The jury could well have found that with the road conditions existing, the downhill, the snow and the slush on the road and on the shoulder, the curve to the left with the resulting centripetal force on the Weiner car to go to the right, that the accident was unavoidable by her. The courts have recognized that unavoidable accidents, such as this, absolve parties from liability. In *Romanelli* v. *Gordon*, 39 A.D. 2d 594, 595, it was held reversible error to refuse to charge the jury that "it was free to find that neither defendant was negligent and that the accident was unavoidable due to the inclemency of the weather" (cf. *Wunderlich* v. *Hipper*, 35 A.D. 2d 733). In *Borock* v. *Goldberg*, 51 N.Y. Supp. 2d 93 (not otherwise reported), in which plaintiff also was a passenger in one of two colliding motor vehicles and sued both, there was a verdict for both defendants. The Appellate Division of the New York Supreme Court unanimously affirmed the judgment for the defendants entered on the verdict of the jury.

*McGrath* v. *Abramowsky*, 35 A.D. 2d 669, was a case by a passenger in a motor vehicle for injuries sustained in a collision. The trial court set aside the jury's verdict

*In *Holpp*, the Court held: "By failing to move for a directed verdict, respondent [plaintiff] conceded that there were questions of fact to be determined by the jury [cit.]."

for defendants and ordered a new trial. The Appellate Division reversed and reinstated the verdict, holding:

> "Plaintiffs' testimony constituted a prima facie showing of negligence on the part of defendants [cit.]. However, 'despite the fact that no evidence was offered on defendant[s'] behalf as to how the accident occurred, the jury was not required to resolve the issue of negligence against the defendant[s]' [cit.]. On the proof adduced, it may not be held that the evidence preponderated so greatly in favor of plaintiffs as to establish that the jury's verdict for defendants 'could not have been reached upon any fair interpretation of the evidence' [cit.]. The jury might well conclude from the proof that neither defendant was negligent."

In *Veihelmann* v. *Manufacturers Safe Deposit Co.*, 303 N.Y. 526, the New York Court of Appeals stated, at page 530:

> "The question of negligence is for a jury when there is a conflict in the evidence or when, though there is no such conflict, fair-minded men can draw more than one inference from the undisputed facts."

It was well within the jury's province to decide the questions of fact in this case as they did, and to draw the inferences that they deemed justified by the evidence, and the trial court sustained that finding (4, 8-10).

**(c)**

The traditional test or criterion as to whether the verdict of a jury in favor of a defendant should be set aside is stated in *Smith* v. *Fasonella*, 15 A.D. 2d 844, at page 855:

> "It is well established that where a motion is made that a jury's verdict is against the weight of the evidence 'a court will not interfere unless it can see that no reasonable man would solve the litigation in the way the jury has chosen to do.' [cit.]."

Few principles of law are now more firmly established than the principle that a jury verdict in favor of a defendant, unlike a jury verdict in favor the plaintiff, should not be set aside unless it "could not have been reached upon any fair interpretation of the evidence" (*Freedman* v. *Coca-Cola Bottling Co.*, 26 A.D. 2d 554, affd. 19 N.Y. 2d 756; *Olsen* v. *Chase National Bank*, 10 A.D. 2d 539, 544, affd. 9 N.Y. 2d 829).

In *Pertofsky v. Drucks*, 16 A.D. 2d 690, the Court stated:

> "If a jury's verdict is in defendant's favor, a motion to set such verdict aside as contrary to the weight of the evidence stands on a different footing than a motion to set aside a jury's verdict in plaintiff's favor. When the motion is by the plaintiff to set aside a verdict in favor of defendant, the motion should not be granted unless the evidence preponderated so greatly in plaintiff's favor that the jury could not have reached its conclusion on any fair interpretation of the evidence [cits.]."

*Pertofsky* further stated:

> "Despite the fact that plaintiff's testimony constituted a prima facie showing of negligence on the part of defendant, and despite the fact that no evidence was offered on defendant's behalf as to how the accident occurred, the jury was not required to resolve the issue of negligence against the defendant. [cits.]."

It is fundamental that it was for the jury to choose what portions of the evidence it accepted and what inferences it drew therefrom to render its verdict thereon. This principle was stated thus in the New York Pattern Jury Instructions, Vol. 1, p. 15, in pertinent part: "The law does not, however, require [the jury] to accept all of the evidence [the Court] shall admit, even though it be competent. In determining what evidence [the jury] will accept, [the jury] must make [its] own evaluation of the testimony given by each of the witnesses, and determine the degree of weight [the jury] choose to give to his testimony."

It also is fundamental that "it is the jury and not the judge which is to draw the inference." (*Salomone v. Yellow Taxi Corp.*, 242 N.Y. 251, 259), that defendant as respondent is "entitled to the benefit of the most favorable inference that may reasonably be drawn from the evidence" (*Ditmars* v. *Renz*, 269 N.Y. 191, 193), and that "where conflicting inferences can be drawn from testimony, a question of fact is presented for the jury" (*Ditmars* v. *Renz*, 269 N.Y. 191, 197).*

There also is the fact that the trial court denied plaintiff's motion to set aside the verdict. *Harris* v. *Brooklyn and Queens Transit Corp.*, 249 App. Div. 749, is in point:

> "The trial justice was in the atmosphere of the trial and participated freely in the examination of witnesses. If, under the circumstances, he thought that the verdict was against the weight of evidence, he would have found *Zukas* v. *Lehigh Valley Coal Co.*, (187 App. Div. 315, 319) applicable. A study

*Plaintiff's counsel did not dispute the trial court's statement that there were conflicting inferences to be drawn from the evidence and that the evidence itself was in conflict (549).

of the record indicates that a fair question of fact was presented as to the place of the accident and the negligence of the defendant. Judgment affirmed, . . . ."

**(d)**

Plaintiff's reliance on the *Pfaffenbach* case (17 N.Y. 2d 132) is misplaced.

Prior to *Pfaffenbach*, the law in New York was that proof that an automobile went off the road, or crossed the road, or skidded, did not establish a *prima facie* case of negligence on the part of the automobile's driver and so a plaintiff passenger's case against the owner or the driver of the automobile had to be dismissed (*Lahr* v. *Tirrill*, 274 N.Y. 112; *Galbraith* v. *Busch*, 267 N.Y. 230; *Piccolo v. Knight of Rest Products Corp.*, 7 A.D. 2d 369, affd. 9 N.Y. 2d 662; *Gooch* v. *Shapiro*, 7 A.D. 2d 307, affd. 8 N.Y. 2d 1088).

*Pfaffenbach* changed that. In *Pfaffenbach* the jury rendered a verdict for plaintiff and judgment for plaintiff was entered on that verdict. The Appellate Division reversed that judgment and dismissed plaintiff's complaint on the authority of the then existing New York law. In reversing that dismissal, the New York Court of Appeals held (17 N.Y. 2d, at pp. 135, 136) that proof that a car skidded, or went on to the wrong side of the road, or went out of control, was "sufficient to go to the jury to determine [whether there was] liability." It did not hold, as plaintiff argues in the case at bar, that the jury had to find defendant liable.

In the case at bar, the trial court did submit that question to the jury in a proper and unexceptionable charge

(607-8) which plaintiff's attorney expressly agreed to (529-30), and the jury unanimously found for defendant (647-8).*

Akin to this are cases in which the doctrine of *res ipsa loquitur* is applicable. Even though in such cases, as in the case at bar, this is sufficient to require that the case be submitted to the jury as a question of fact for the jury to decide, the jury may, but is not required to, infer that there was negligence (*Griffin* v. *N.Y.C.R.R. Co.*, 277 App. Div. 320, 323). In the recent case of *Chisholm* v. *Mobil Oil Corp.*, 45 A.D. 2d 776, "defendant came forward with no explanation overcoming the implications of plaintiff's proof." The court held:

> "*Res ipsa loquitur* is essentially a rule of evidence which permits, but does not require, the jury to infer on the basis of circumstantial evidence that an unusual occurrence resulted from the defendant's negligence (*Fogal* v. *Genesee Hosp.*, 41 AD 2d 468). The jury has great latitude in this type of case and, should the plaintiff prove a prima facie case, would nonetheless be justified at law in finding for defendant (*George Foltis, Inc.* v. *City of New York*, 287 N.Y. 108). Even where the defendant offers no proof, it is still for the jury to decide, on plaintiff's proof, whether liability has been established (*Judd* v. *Sams*, 270 App. Div. 981, affd. 296 N.Y. 801)."

This is a principle of long standing. In *Davis* v. *Goldsmith*, 19 A.D. 2d 514, it was held:

> "The trial court, in charging upon the applicability of the doctrine of *res ipsa loquitur*, incorrectly

*Additionally, plaintiff's express agreement to the submission of this question to the jury as a question of fact for the jury's decision establishes this as the agreed "law of the case" (*Brown v. DuFrey*, 1 N. Y. 2d 190, 195-6).

> stated that defendants Goldsmith and Coca-Cola had, in effect, a burden to rebut the inference or presumption established by plaintiff's proof. The rule is now well settled that when plaintiff, by his proof, establishes the applicability of the doctrine plaintiff is entitled to go to the jury, but there is no burden of rebuttal, albeit a prima facie case is made out (*George Foltis, Inc.* v. *City of New York*, 287 N.Y. 108, 118; Prosser, Torts [2d ed.] §43)."

The same applicable principle was stated thus in *Salomone v. Yellow Taxi Corp.*, 242 N.Y. 251, 259:

> "In cases of this kind dealing with inferences and presumptions, it is the jury and not the judge which is to draw the inference and determine the effect of presumptions. It is not the accident which alone and of itself may raise the presumption of negligence. It is the accident accompanied by all the surrounding circumstances. The circumstances and the events leading up to the accident may overcome any presumption of negligence which might otherwise arise. Even when there is a presumption of negligence arising from a failure upon the part of a common carrier to explain how an accident happened, it is for the jury to say whether the presumption, which is only *prima facie* evidence of negligence, entitled the plaintiff to a verdict."

and was stated thus in *George Foltis, Inc.* v. *City of New York*, 287 N.Y. 108, 122:

> "Where a plaintiff establishes *prima facie* by direct evidence that injury was caused by negligence of the defendant the court may seldom direct a verdict, though the plaintiff's evidence is not contradicted or rebutted by the defendant. In such cases the question of whether the defendant was in fault in what he did or failed to do is ordinarily one of fact to be determined by the jury unless the jury is waived. The practice should be the same

> where under the rule of *res ipsa loquitur* the plaintiff establishes *prima facie* by circumstantial evidence a right to recover."

See also: *Braun* v. *Consolidated Edison Co.*, 31 A.D. 2d 165, 169; *Hatch* v. *King*, 33 A.D. 2d 879.

## POINT II.

### (Answering plaintiff's Point III)

**Proof of defendant's financial interest in the outcome of the case was admissible.**

**Defendant's summation thereon does not constitute ground for reversal under the circumstances in this case.**

**As to the questions plaintiff complains of.**

It was conceded that Mrs. Weiner was a beneficiary of any proceeds that might be recovered in the case at bar and so was interested in the event (458; cf. 460).

It is well established that a witness's financial interest in the outcome of a case may be proved as affecting the credibility of that witness (*Coleman* v. *New York City Transit Authority*, 37 N.Y. 2d 137, 142). Plaintiff's attorney acknowledged his recognition of this in his summation to the jury (568):

> "In other words, the only reason this was brought into this case was on a technical basis--it wasn't the reason Mr. Zawacki brought it into the case--but the legal basis was, if someone is interested in the events, which Mrs. Weiner technically is,

would she, given the opportunity, tell the truth or help her own case, because she is interested on both sides.

So, on that technicality it came into the case--a great weapon--but that's the reason."

Consequently, the questions asked Mrs. Weiner that plaintiff quotes and complains of (at page 26 of her brief) were proper.

**As to the summation plaintiff complains of.**

*(a)*

Although plaintiff objected to another part of defendant's summation, which plaintiff does not raise on this appeal (541-5, 547), plaintiff never objected to, or moved with respect to, the part of defendant's summation it quotes and raises on this appeal at pages 28-29 of her brief (539, 545-6, 561-2).

The tactics of plaintiff's highly experienced trial attorney obviously were to permit and adopt defendant's summation as an opportunity for plaintiff to use the same in plaintiff's own summation to the advantage of plaintiff and as a boomerang against defendant. Plaintiff proceeded to do this at a great length in plaintiff's own summation (565-70) and asked the jury to "take care of this for me [plaintiff]" (570). We submit that plaintiff should not now be permitted to complain of this.

Additionally, plaintiff's failure to object to defendant's summation or to move with respect thereto constitutes a waiver of plaintiff's present claim (*Schein v. Chest Service Co., Inc.*, 38 A.D. 2d 929). In *Schein*, the Court stated:

> "Counsel may not be permitted to speculate upon whether a verdict will be favorable, before asserting a claim for a mistrial. Such a motion must be made in advance of the verdict."

See also: *Elliott v. Maggiolo Corp.*, (C.C.A. 2d Circ.), September 12, 1975, p. 6141; Docket Nos. 75-7016, 75-7041.

*Gutin* v. *Frank Mascali & Sons, Inc.*, 198 N.Y.S. 2d 492, 504, cited by plaintiff at page 31 of her brief as authority to the contrary and as authority for this Court to order a new trial, actually is authority for defendants. The citation given by plaintiff was the decision of the trial court in setting aside the jury's verdict. On appeal from that decision, the Appellate Division unanimously reversed the same and reinstated the jury's verdict (13 A.D. 2d 817) and the New York Court of Appeals affirmed the Appellate Division (11 N.Y. 2d 97).

*(b)*

The record shows that defendant's summation that plaintiff complains of did not have the effect on the jury that is claimed by plaintiff. This is shown by the questions asked by the jury, relating to liability, during the time it was deliberating (626-7, 627-8). (cf. *Benoit* v. *Travaglini*, 43 A.D. 2d 587; *People* v. *Griffin*, 29 N.Y. 2d 91, 93-4).

*(c)*

It may not be amiss to note that in his summation plaintiff's attorney improperly made an appeal for a sympathetic verdict (589-90), improperly spoke of a $100,000 verdict for a child in another, unrelated, case (596; cf. 599-600), and improperly addressed jurors by their names (570) (55 A.L.R. 2d 1199 *et seq.*; *Aponte* v. *State*, 30 N.J. 441).

## POINT III.

### (Anwering plaintiff's Point IV)

**It was not reversible error for the court (1) to refuse to charge (a) additionaly as to the right of the estate to sue and (b) the *Noseworthy* doctrine as to plaintiff and (2) to charge the doctrine of reasonable foreseeability.**

**As to the right of the estate to sue.**

During his summation the defendant's attorney himself told the jury explicitly: "The Weiners have every right to bring this case into court." (561) Also, the entire charge showed that the Weiners had the right to sue (602 *et seq.*).

Plaintiff's request for an additional charge that the Weiners had the right to sue, made after the charge was completed (621), was denied because, as the court stated, it would "highlight that point again" (621-2). That ruling was proper. As was said in *Koehler* v. *Grace Line, Inc.*, 285 App. Div. 154, 157-158:

> "Even when the request embodies a correct exposition of the law, there is danger of inappropriate and dangerously timed emphasis on only one aspect of the issues."

A corollary applicable principle is that even if the substance of a request is legally correct it is not reversible error to refuse to charge it when the main charge correctly defines the issues (*Gross* v. *City of New York*, 24 A.D. 2d 751, affd. 18 N.Y. 2d 830). This the main charge did in the case at bar.

**As to the charge on reasonable foreseeability.**

Reasonable foreseeability of an accident by a defendant is a necessary pre-requisite to liability in a negligence action. The case at bar is a negligence action. Defendant would not be liable unless she could reasonably have foreseen that conduct on her part would cause or lead to an accident (*Palsgraf* v. *Long Island R. Co.*, 248 N.Y. 339, 341, 344; *Halverson* v. *562 West 149th Street Corp.*, 290 N.Y. 40, 42-43; *Prosser, Torts (4th Ed.)*, §43, p. 250).* As was stated in *Palsgraf*, at page 341: "Proof of negligence in the air, so to speak, will not do." and at page 344, in pertinent part: "The risk reasonably to be perceived defines the duty to be obeyed. . . ."

Consequently, the trial court properly charged the jury thereon.

Furthermore, although before the summations and charge (1) plaintiff's attorney had been given the proposed charge (which incorporated reasonable foreseeability, that plaintiff now complains of) and (2) that proposed charge was discussed in detail with the attorneys, including the attorney for plaintiff (494 *et seq.*), plaintiff did not object to a charge as to reasonable foreseeability.

What is more, after the charge was given the jury asked that a portion thereof, which included the charge as to reasonable foreseeability (602-3), be re-read to it (626-7), and this, including the aforesaid reasonable foreseeability portion, was done (627-8), and plaintiff's attorney expressly acquiesced thereto and in fact asked for

*We do not say that there must be reasonable foreseeability of the particular accident that happened. But, there must be reasonable foreseeability of "an" accident.

a clarification on reasonable foreseeability, which was given as requested by plaintiff (629-32). It was not until some time after that that plaintiff for the first time objected to the charge as to reasonable foreseeability, even though he had had that proposed charge for a week and had acquiesced thereto (632-3). Nor did plaintiff make his objection until after the jury had been deliberating its verdict for a considerable period of time (623, 632-3).

We submit that, aside from the fact that the charge complained of was proper, plaintiff's new-found complaint is untimely and unfair (cf. Federal Rules of Civil Procedure, Rule 51).

**As to the *Noseworthy* doctrine.**

*(a)*

Plaintiff's argument is based on the assumption that the bare fact that a party is dead, that alone and without more, calls for the application of the *Noseworthy* doctrine (298 N.Y. 80) and a charge to the jury thereon. Plaintiff is mistaken. The rationale of the *Noseworthy* doctrine is that where the death of a party, who, if alive, could have testified to facts showing how the accident happened, prevents him from testifying to such facts, that such a party is held to a lesser degree of proof. Plaintiff, at page 38 of her brief, recognizes this underlying reason and quotes it as stated in *Noseworthy*:

> ". . . in a death case a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff *can himself describe the occurrence.*" (emphasis added).

That is not the situation in the case at bar. At no time during the trial did plaintiff claim that the deceased

child could have testified to facts showing how the accident happened. On the contrary, plaintiff's attorney implicitly averred that she could not. Both children, the decedent and her brother Alan, were sitting in the rear of the car (212-3, 272) and plaintiff's attorney, in explaining why he did not call Alan as a witness, said they were "playing ghost . . . at the time" and "the next thing he remembers is waking up in the Albany Medical Center", thus avowing that the child could add nothing as to how the accident happened (587). We submit that this of necessity applies to decedent as well as to her brother with whom she was playing and so also was, as he was, inattentive to what was happening. Thus, the reason for the application of the *Noseworthy* doctrine is not present in the case at bar and the trial court properly refused to charge it. It may be noted that every possible witness to the accident did testify as to what happened.

*(b)*

Defendant Mrs. Weiner was alive and thus would have been able to testify to what had happened but was prevented from doing so by her amnesia (189, 190, 63, 64, 99, 111-13, 208, 225-26), which plaintiff's attorney repeatedly conceded (244, 248, 583; ptff.'s exs. 4 and 5; cf. 199). Plaintiff's attorney summed this up, ". . . as sure as I am standing here, this woman [defendant Mrs. Weiner] has no memory of this accident. . . ." (583).

The *Noseworthy* rule is applicable on behalf of an amnesiac such as Mrs. Weiner for the very same reason that it would be applicable on behalf of a deceased (*Townley v. Bagby Transfer Co.*, 19 A.D. 2d 757; *Cameron* v. *Dooley*, 18 A.D. 2d 130; *Wartels* v. *County Asphalt*, 29 N.Y. 2d 372).

And so, a *Noseworthy* charge for plaintiff, if it would have been proper on the facts, which it was not, would have evoked a similar charge for defendant Mrs. Weiner. That would have been productive of confusion in the minds of the jury.

**In Conclusion,**

it is respectfully submitted that the judgment for defendant Barbara Weiner should be affirmed.

Respectfully submitted,

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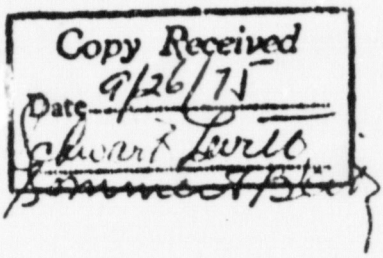
Attorneys for Defendant-Appellee
Barbara Weiner

ARTHUR N. SEIFF,
Of Counsel.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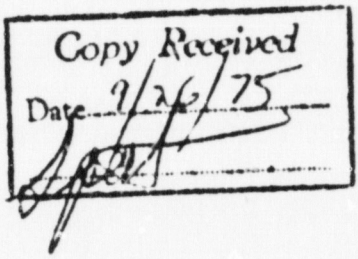
Edward Levi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